HARTA EMPAT SDN. BHD.

v.

KOPERASI RAKYAT BERHAD

HIGH COURT MALAYA, IPOH
DATO' P.S. GILL J
[ORIGINATING SUMMONS NO. 24-995-91]
12 SEPTEMBER 1995

COMPANY LAW: *Loan to director - Granted by co-operative society - Company providing security - Charge transaction - Whether void and unenforceable - Whether prohibited by s. 133A(1) of Companies Act - Provisions of Companies Act - Whether applicable - Whether ousted by s. 57 Co-operative Societies Act 1948.*

CO-OPERATIVE SOCIETIES: *Loan - Co-operative society granting loan to company director - Charge of assets by company as security - Whether transaction enforceable - Section 133A(1) Companies Act - Whether applicable - Section 57 Co-operative Societies Act 1948 - Effect of.*

The plaintiff company had created a third party charge in favour of the defendant co-operative society, as security for a loan given by the latter to its director. Section 133A(1) of the Companies Act 1965, however, prohibits the plaintiff from entering into such a transaction. Following a dispute pertaining to the settlement of the loan, the plaintiff sought a declaration that the charge transaction, having contravened s. 133A(1), was void and unenforceable, and therefore the plaintiff was entitled to recover the money paid or have the charged assets freed of the charge. Counsel for the defendant, relying on *CCB v. Syarikat Bukit Tinggi* [1991] 1 CLJ, argued that s. 57 of the Co-operative Societies Act 1948 has excluded the application of the provisions of the Companies Act to matters relating to co-operative societies, and therefore s. 133A(1) cannot apply to the transaction. In any case, Counsel argued that although the borrower on record was the plaintiff's director, the actual recipient and beneficiary of the loan was the plaintiff themselves, and hence, there was no contravention of s. 133A(1) as alleged. The plaintiff contended that s. 57 of the Co-operative Societies Act only relates to the internal management of co-operative societies, with no wider effect, and as such, does not bar the application of s. 133A(1) to the defendant or the disputed transaction.

Held:

[1] Section 57 of the Co-operative Societies Act 1948 plainly ousts the provisions of company law in respect of Co-operative Societies. In the circumstances, the provisions and application of company law, and s. 133A(1) of the Companies Act in particular, have no bearing on the present dispute. The charge of the defendant is therefore valid and enforceable. In any case s. 133A(1) is not intended to permit any person to take advantage of the provisions of the Act.

[2] The Court in arriving at a fair and just decision must look beyond the form adopted. In the instant case, on the facts, the real borrower of the loan was the plaintiff and not its director. The loan was taken for the pure benefit of the company and the said director was merely acting as the company's alter ego. That being the case, to determine the main beneficiary of the loan, the corporate veil must be lifted.

[Application dismissed].

Cases referred to:
Che Wan Development Sdn. Bhd. v. Co-operative Central Bank Bhd. ***(not foll)***
Malayan Banking v. International Tin Council [1989] 3 MLJ 280 ***(refd)***
CCB v. Syarikat Bukit Tinggi & 18 Ors. [1991] 1 CLJ ***(foll)***
Co-operative Central Bank v. Abdul Razak [1991] 3 CLJ ***(refd)***
Co-operative Central Bank v. Real Vest Properties [1992] 3 CLJ ***(foll)***

Legislation referred to:
Civil Law Act 1956, ss. 3, 6
Companies Act 1965, ss. 133, 133A(1)
Co-operative Societies Act 1948, ss. 30, 30(1)(a), 57
Evidence Act 1950, s. 91
National Land Code 1965, s. 241(3)

For the plaintiffs - Dominic Puthucheary (S.P. Lim & Janet Lim with him); M/s. Skrine & Co.
For the defendants - Cyrus Das (J. Mathew with him); M/s. Shook Lin & Bok

JUDGMENT

P.S. Gill J:

The plaintiffs are a private company. The defendants, who are now under receivership, is a co-operative society, registered under the Co-operative Societies Act 1948. On 5 July 1985, a director of the plaintiffs company, namely Mr. Lim Chin Hin, executed certain documents relating to a loan of RM5 million to be obtained from the defendants company. The loan was secured by a third party charge, on lands, held under Title No. HS(D)10414/80-10558/80 PT No. 25767-25911 created by the plaintiffs, in favour of the defendants' co-operative, and bearing Charge Presentation No. 19810/85 jilid 1969 folio 13.

The plaintiffs seek a declaration that the third party charge which was created by the plaintiffs company in favour of the defendants' co-operative society is void and unenforceable as it contravenes the prohibitions of s. 133A(1) of the Companies Act, 1965. Section 133A(1), *inter-alia*, prohibits a company from entering into a guarantee, or providing any security in connection with a loan made to a director by any other person.

The defendants state that the charge executed by the plaintiffs is valid and enforceable and that there was no contravention of s. 133A(1) of the Companies Act.

The defendants, in their affidavit in reply state, that the plaintiffs, were at all material times a housing developer, and at the material time were developing a housing project known as Taman Sri Kampar. The said Lim Chin Hin, was a principal officer, and director of the plaintiffs company.

It was further alleged by the defendants, and admitted to an extent by the plaintiffs, in their affidavit dated 22 October 1992, that the plaintiffs did apply to the defendant for a loan of RM5 million sometime, on or about 11 June 1985, *vide* a resolution of the company dated 28 June for a loan, but this application was **not** approved on the grounds that s. 30 of the Co-operative Act only allowed for loans to be given to the members of a co-operative.

In view of this provision the said Mr. Lim Chin Hin, was then appointed by the plaintiffs company to apply for membership of the co-operative society in order to be entitled to a loan. A resolution was passed by the directors of the company on 29 June 1985 confirming this.

The directors' resolution reads as follows:

1. That the company shall create a first legal charge over 139 titles as per list attached in favour of Koperasi Rakyat Berhad as security for loan of RM5 million granted to Mr. Lim Chin Hin.

2. And the authority be and is hereby given to any of the directors to execute the charge and all relevant documents relating thereto and where necessary; to affix the common seal of the company thereto provided such documents be countersigned by another director or by the secretary.

Consequently, on 19 August 1985, the said Mr. Lim Chin Hin applied to become a member of the defendants' co-operative society, and his membership was approved on 24 October 1985.

Learned Counsel for the defendants argued that, the said loan of RM5 million was granted by the defendant's cooperative to Mr. Lim Chin Hin, as the borrower on record, though, the actual recipient and beneficiary of the said loan was the plaintiffs company. He referred the Court to the correspondence between the plaintiffs and the defendants, and in particular to copies of letter dated 24 October 1985 and 29 October 1985:

Harta Empat Sdn. Bhd.
7th Floor, Bangunan Lim Tan, 298-300,
Jalan Pudu, Kuala Lumpur,
Malaysia.

Tarikh: 24 October 1985.

Attention: Mr. Yap Yong Yin

Koperasi Rakyat Berhad
No. 89-91, Jalan Maharajalela
(Jalan Birch)
Kuala Lumpur

Dear Sir,

Re: Fixed Loan of RM5 Million Harta Empat Sdn. Bhd.

We refer to our letter dated 18 October 1985 and would like to inform you that two titles be left out of Appendix I and Appendix II.

H.S.(D) KA	P.T.No.	Full Value
10644/80	25997	42,500
10645/80	25998	42,500

The total value of 95 titles replacing the original titles is RM5,783,565 (Appendix B) as compared to RM5,699,150 (Appendix A.)

Yours faithfully,
Harta Empat Sdn Bhd.

Sgd:

Ms. Ng Siew Boey
Financial Controller

c.c. Michael Chen & Lee
(Advocates and Solicitors)

Chye, Chow, Chung & Co,
(Advocates & Solicitors),

NSB/cn.

Harta Empat Sdn. Bhd.
7th. Floor, Bangunan Lim Tan, 298-300,
Jalan Pudu, Kuala Lumpur,
Malaysia.

Tarikh: 29 October 1985.

Koperasi Rakyat Berhad
No, 89-91, Jalan Maharajalela
(Jalan Birch)
Kuala Lumpur

Dear Sir,

Re: Fixed Loan of RM5 Million Redemption and Discharge of Charge 139 Titles

We refer to the telephone conversation between your Katherine Chan and the undersigned on 29 October 1985. As requested, we are writing here to replace 97 titles for the above redemption and discharge of charge

Kindly treat the letter dated 26 October 1985 as cancelled. We enclose here a list of 97 titles (Appendix I) valued at RM5,784,150 to be replaced by another 97 titles listed in Appendix II valued at RM5,749,790.

Please forward a letter to Public Finance Bhd stating that you do agree to replace 97 titles for the above redemption and discharge of charge.

Many thanks for your co-operation.

Yours faithfully,

Harta Empat Sdn. Bhd.

Sgd:

Ms. Ng Siew Boey
Financial Controller

c.c. Michael Chen & Lee
(Advocates & Solicitors)

Chye, Chow, Chung & Co.
(Advocates & Solicitors)

Public Finance Bhd.

NSB/cn.

Learned Counsel for the defendants referred the Court to a letter dated 29 August 1985 from the solicitors for the plaintiffs to Messrs Public Finance Bhd. which clearly indicated that a substantial proportion of the said loan totalling RM1,994,000 was remitted by the defendants' co-operative society to Public Finance to enable the plaintiffs to redeem the said lands from Public Finance Bhd, and in the process, settling the plaintiffs' financial obligation with the said finance company. For easy reference, this letter is produced below.

Michael Chen & Lee
Advocates & Solicitors
8th Floor, Bangunan Bangkok Bank
105, Jalan Bandar
Kuala Lumpur

Our Ref: KRB/64/65
Your Ref: PFB/KL/2464/83 By Hand

29 August 1985

Public Finance Berhad
1-7, Jalan Ampang
P.O. Box 12005
Kuala Lumpur 01-17.

Dear Sirs,

Re: Discharge of 139 titles Harta Empat Sdn Bhd

We refer to your letter of the 7th instant and upon your undertakings as therein contained, we enclose herewith our clients' account cheque no: 279448 for the sum of RM1,994,900 being the redemption sum.

We will be forwarding the discharge of charge very shortly.

Yours faithfully, .

Sgd

c.c. The Secretary
Koperasi Rakyat Berhad

c.c. M/s Harta Empat Sdn Bhd

/lee.

The balance sum of RM2,134,525 was subsequently disbursed to the solicitors of the plaintiffs company *vide* letter dated 19 September 1985 which reads as follows:

Michael Chen & Lee
Advocates & Solicitors
8th Floor, Bangunan Bangkok Bank
105, Jalan Bandar
Kuala Lumpur

Our Ref: KRB/64/65

Your Ref: CSY/11521/85/Jl

19 September 1985

M/s. Chye, Chow, Chung & Co,
Advocates & Solicitors
4th Floor, Bangunan Lim Tan,
298-300, Jalan Pudu
Kuala Lumpur

Dear Sirs,

Re: Loan of RM5 Million to Lim Chin Hin

We enclose herewith our clients' D&C cheque no. 168927 for the sum of RM2,062,500 together with our clients' account PB cheque no. 279450 for the sum of RM72,025 both in favour of the borrower, being the balance of the loan disbursement less our fee and

disbursements in respect of the discharges of charge. A copy of our bill is also enclose herewith for your clients' information.

Kindly acknowledge receipt on the duplicate of this letter and return for our records.

Yours faithfully,

Sgd:

c.c. Koperasi Rakyat Berhad.

Encls,

/lcl.

In the light of all this evidence, it was the contention of Counsel for the defendants, that the beneficiary of the said loan transaction, was the plaintiffs and **not** Lim Chin Hin.

However, the plaintiffs' Counsel, submitted that, from the tenor and heading of the said letter dated 19 September 1985, it was, Lim Chin Hin, who was the borrower and the ultimate beneficiary of the loan.

It was further argued by the learned Counsel for the plaintiffs, that the charge document, which is a contractual document in essence, clearly, and unambiguously, states on the face of the document that Lim Chin Hin is the borrower. Any extrinsic evidence, which is intended to be used, that in substance the borrower is the plaintiffs company, contravenes provisions of s. 91 of the Evidence Act. Section 91 essentially excludes extrinsic evidence, being adduced, of the terms of a document by providing that no evidence may be given in proof thereof except the document itself.

Counsel for the plaintiffs, went on to submit, that ss. 3 and 6 of the Civil Law Act, 1956, excluded the application of the jurisdiction of equity in our land law under the National Land Code, 1965. Even for the sake of argument, he submitted if it was possible to seek the help of equity for a relief **or** interpretation of the declaration the implication would be that Harta Empat Sdn. Bhd., were the actual borrowers for the facilities of RM5 million granted in the name of Lim Chin Hin. This would amount to a circumvention of s. 30(1)(a) of the Co-operative Societies Act, 1948, which allows loans to be given to members, and members only, and not otherwise. It is trite law, submitted learned Counsel for the plaintiffs, that he who comes to equity must come with clean hands, and if the defendants seek the aid of equity by way of circumvention of legislation, equity cannot assist them in their claim. The plaintiffs' case, quite simply, was based on s. 241(3) of the National Land Code, 1965 which is to be read in conjunction with s. 133A(1) of the Companies Act. Section 241(3) reads as follows:

241(3) The said powers shall be exercisable in any particular case subject to:

a. any prohibition or limitation imposed by this Act or any other written law for the time being in force;

b. any restriction in interest to which the land in question is for the time being subject; and

c. In relation to leases, the provision thereof, express or implied.

Section 133A(1) of the Companies Act reads as follows:

133A(1) Subject to the provisions of this section, a company (other than an exempt private company) shall not:

a. make a loan to any person connected with a director of the company or of its holding company; or

b. enter into any guarantee or provide any security in connection with a loan made to such person by any other person.

He submitted that by applying s. 133A(1) of the Companies Act to the facts it amounted to a creation of a charge of the plaintiffs' assets, as security of payment of a director's loan from a third party, thereby constituting a breach against s. 133A(1) of the Companies Act, 1965.

Counsel for the plaintiffs further submitted, the contravention of s. 133A(1) of the Companies Act, 1965, by the defendants was illegal and any charge executed or contract entered into by the parties was void *ab initio* and unenforceable. The plaintiff company was thus entitled to recover money paid **or** assets charged notwithstanding breaches of the said prohibition. The case of *Che Wan Development Sdn. Bhd. v. Co-operative Central Bank Bhd.* was cited to support Counsel's contention.

Plaintiffs' Counsel also submitted that the learned Judge, Justice Mohamed Dzaiddin (as he then was) in the case of *Co-operative Central Bank Bhd. v. Syarikat Bukit Tinggi & 18 Ors.*, erred in stating that the judgment in *Che Wan Development* was *per incuriam* in that the Judge's attention in *Che Wan* case was not drawn to s. 57 of the Co-operative Societies Act, 1948, which should have been applied to render the invalid security into a valid security.

Section 57 of the Co-operative Societies Act, 1948 reads as follows:

> The provisions of the laws for the time being in force relating to trade unions, associations, societies and companies shall not apply to societies registered under this Act.

Learned Counsel submitted further in regard to the interpretation of s. 57, by referring to the long title of the Co-operative Societies Act, 1948, which according to him serves as a guide to the purpose of the Act. The material words in the long title are "Constitution and Control", which is basically in, respect of function, internal management, administration and regulation, of the co-operative. It was his view that s. 57 should be read in the context of the whole Act, and in harmony and support of the long title, and that being so, s. 57 merely relates to the capacity of the co-operative to enter into transactions and sets out the internal management of the co-operative society. As such, the prohibitions of s. 133A(1) of the Companies Act are equally applicable to the co-operative societies. He admitted that the defendants did have ability to transact, it was just that the entire transaction was illegal, and unenforceable under s. 133 of the Companies Act.

Learned Counsel for the defendants submitted that s. 133A(1) of the Companies Act does not apply, as a matter of law, because of s. 57 of the Co-operative Societies Act, 1948, Counsel relied on the case of *CCB v. Syarikat Bukit Tinggi* [1991] 1 CLJ and submitted that it was rightly decided, in that, s. 57 of the Co-operative Societies Act, 1948, does oust the application of the provisions of the Companies Act in matters relating to co-operative societies.

Having said that, Counsel for the defendants also went on to submit, that for all intent and purposes, the so-called third party charge, is in reality a first party charge, where the borrower is not in truth the director of the company, Lim Chin Hin, but instead the company itself.

From a perusal of the documents, he said, especially the resolution of the company dated 29 June 1985, it is evident that the company was in reality the borrower. Further, a substantial portion of the loan totalling RM1,994,900 was remitted by the defendants to Public Finance Bhd. on **or** about 29 August 1985, so as to enable the company to redeem the lands charged to the said finance company. This redemption exercise settled the company's financial obligation to the said finance company. The balance sum of RM2,062 million was in fact remitted to the solicitors of the plaintiffs company, which also included legal fees *vide* a letter dated 19 September 1985.

It was the view of Counsel for the defendants that the loan document and the relevant affidavits clearly show that the loan concerned was for the beneficial interest of the company.

The Court, in considering the evidence and submissions, took special note on this issue, of s. 57 of the Co-operatives Act. I am resolute in my views, that, s. 57 plainly ousts the provisions of company law in respect of the Co-operatives Act. The arguments put forward by the learned plaintiffs Counsel, on the interpretation of the said Act, though interesting are not tenable.

Having given the matter careful consideration, I find that the answer to the problem lies in giving effect to the plain words of s. 57 of the Co-operative Act. It is an established principle of statutory interpretation that in the absence of any ambiguity, and there is none in this instant case, a strict and literal construction should be applied to the language by which Parliament has expressed its collective intention. See *Malayan Banking v. International Tin Council* [1989] 3 MLJ 280.

I am to this extent fortified in my views of this, by the learned Judge's comments, on s. 57 In the light of the Companies Act, in the case of *CCB v. Syarikat Bukit Tinggi* [l991] 1 CLJ. To my mind, on the strength of this ouster clause in section 57 of the Co-operatives Act, the provisions and application of the company law, and s. 133A(1), in particular, has no bearing, in this present instance. If I may state, it is my view that the purpose of s. 133A(1) of the Companies Act, apart from protecting the company's shareholders, was not intended to permit any person to take advantage of the provision of the said Act.

Having said that, if I am held wrong in my views in the interpretation of s. 57, upon perusal, and the interpretation of the documentary and affidavit evidence, I am convinced that, despite the fact that the said Lim Chin Hin was the borrower of the said sum, it was purely for the benefit of the plaintiffs company. This is evidenced by the payment of the sum of RM1,994,900, to the Public Finance Bhd to redeem the lands charged by the said company to the bank, for the purposes of development, and a further sum of RM2,062 million was subsequently remitted to the then solicitors for the company on 19 September 1985. The Court in arriving at a fair and just decision must look beyond the form adopted, and examine the reality. It is of paramount importance to determine the purpose of the parties concerned, in regard to the obtaining of the loan.

In the instant case, I am of the view with respect that the corporate veil should be lifted in order to ascertain who was the main beneficiary of the loan. It cannot be denied that upon perusal of the facts and documents, the plaintiffs assisted this Lim Chin Hin to apply for the loan from the defendants company. After the loan was obtained, the plaintiffs used monies for their own benefit. In the circumstances, I find it hard to accept the contention of the plaintiffs, not to delve into, the dealings entered between Mr. Lim of Harta Empat Sdn. Bhd. and the plaintiffs, on the grounds that it was not a relevant issue

in these proceedings. Contrary to this, having had the benefit of reviewing the entire evidence, I am of the view, that the said Lim Chin Hin, was in fact merely an alter ego of the plaintiffs company.

Learned Counsel for the plaintiffs argued that, the loan facility by the defendants company was approved and disbursed to the said Lim Chin Hin on 29 August 1985, even though, his application for membership, was only approved on 24 October 1985, which was subsequent to the disbursement of the loan. This, he submitted, amounted to an *ultra vires* act by the defendants company. What was however not contested was that the said Lim Chin Hin, did make an application for membership, much **before** the disbursement of the loan. To me, Lim Chin Hin, was a member at the time of the approval and disbursement of the loan, because, the final act of approving his application for membership was purely an administrative act of clearing membership. *Co-operative Central Bank v. Abdul Razak* [1991] 3 CLJ.

Lastly, Counsel for the plaintiffs went on to submit that, if one accepts Lim Chin Hin, as the borrower of the loan, then s. 30 of the Co-operative Societies Act, 1948, provides that loans from co-operative societies can only be granted to members. Here, to circumvent this, the defendants had accepted Lim Chin Hin as a notional borrower, when in actual fact, the beneficiary of the loan was a third party. This was clearly a contravention of the provisions of the Co-operative Societies Act 1948, and the Rules and Regulations made thereunder. To my mind, the only condition precedent to an application for a loan is that the applicant must be a member before he or she is eligible for a loan. There is no mention in the Co-operative Societies Act, 1948 of any prohibition, against a member of a co-operative society, from obtaining a loan to be utilised by his corporation. I find support of this proposition of law, in the decision of Lim Beng Choon J, in the case of *Co-operative Central Bank v. Real Vest Properties* [1992] 3 CLJ.

In the light of my views on s. 57 of the Co-operative Act, and the nature and purpose of the transaction, and having reviewed the evidence as a whole, I hold that the charge of the defendants is valid and enforceable, and that the plaintiffs application is dismissed with costs.